

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Redesignation of the 17.7-19.7 GHz Frequency)	IB Docket No. 98-172
Band, Blanket Licensing of Satellite Earth)	
Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz)	
Frequency Bands, and the Allocation of)	
Additional Spectrum in the 17.3-17.8 GHz and)	
24.75-25.25 GHz Frequency Bands for)	
Broadcast Satellite-Service Use)	

To: The Commission

REPLY OF WINSTAR COMMUNICATIONS, INC.

Winstar Communications, Inc. (“Winstar”), pursuant to Section 1.429(d) of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”), hereby submits its Reply (“Reply”) to the Oppositions filed¹ in the above captioned proceeding.² Generally, the Oppositions make numerous mischaracterizations of the Winstar Petition for Reconsideration (“Petition”)³ which require clarification.

I. Response

1. As an introductory matter, Winstar has always been on record as supporting the growth of the satellite industry.⁴ Winstar is hopeful that those filing Oppositions or Petitions from

¹ Winstar is Replying to the Oppositions filed on November 13, 2000 by Teledesic, LLC (“Teledesic”); Hughes Electronic Corporation (“Hughes”); Pegasus Development Corporation (“Pegasus”); Satellite Industry Association (“SIA”); GE American Communications (“GE”); ASTROLINK International LLC (“ASTROLINK”); TRW Inc. (“TRW”); and the Independent Cable & Telecommunications Association (“the ICTA”) (collectively “the Oppositions”).

² Report and Order, *Redesignation of the 18 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in Ka-Band, and the Allocation of Additional Spectrum for Broadcast Satellite Service Use*, IB Docket No. 98-172, 65 Fed. Reg. 54,155 (September 7, 2000) (“the Order”).

³ See Petition for Clarification and Reconsideration of Winstar Communications, Inc., IB Docket No. 98-172, filed October 10, 2000.

⁴ See initial Winstar comments in Docket No. 98-172. See Also speech by Winstar General Counsel, Tim Graham, December 1999, CITEL Conference, San Diego, California.

the satellite industry can soon join the record with statements that they are in support of the growth of the FS and satellite industries.

A. The Winstar Petition is Procedurally and Administratively Sufficient.

2. Several Oppositions question the procedural and administrative sufficiency of the Winstar Petition.⁵ The Winstar Petition meets the requirements of the Commission's rules and must therefore be fully considered on the merits.⁶ However, for the sake of the record, we shall address the specifics of these issues once again.

3. In a detailed manner, Winstar identified specific respects in which the Order should be reconsidered or clarified. First, Winstar maintains that the amount of spectrum to be made available to relocated Fixed Services ("FS") providers is insufficient and fails to allow for growth. Specifically, Winstar believes it is appropriate to require Fixed Satellite Services ("FSS") licensees to account for the total available capacity of the FS system at the time of relocation rather than the capacity in use.⁷ Winstar supported this request with specific information regarding the FS industry's explosive growth and notes that "other media" may not be sufficiently available to accommodate this growth.⁸

4. Next, Winstar requested that incumbent licensees be allowed to return to previous facilities if relocation is unsuccessful⁹ and urged the Commission to retain a voluntary negotiation period.¹⁰ Winstar mapped-out specific measures – based upon FCC precedent – that could be

⁵ See Hughes Opposition at 2; SIA Opposition at 6; and Teledesic Opposition at Page 11, FN 13.

⁶ See 47 C.F.R. 1.429(c) (1999), which states that Petitions must "state with particularity the respects in which the petitioner believes the action taken should be changed."

⁷ See Winstar Petition at 2 (discussing the necessity of the Commission to satisfy the "burgeoning requirements of displaced FS licensees); and 9 (discussing the need of the Order to require FSS licensees to provide incumbents with relocated spectrum reflecting the total capacity of the system itself).

⁸ See Winstar Petition at 9-16 (discussing the unprecedented growth within the FS industry).

⁹ See Winstar Petition at 16 – 18.

¹⁰ See Winstar Petition at 18 – 19.

taken by the Commission to accommodate this proposed change. Accordingly, the specificity required by section 1.429(c) of the FCC's rules was more than adequately met.

B. Winstar Supports Band Segmentation and Adequate Spectrum Allocations.

5. Winstar strongly supports band segmentation. Most parties filing Oppositions mistake Winstar's observations regarding explosive growth within the FS industry as criticism of band segmentation.¹¹ Segmentation must adequately address the reality of an exponentially expanding FS customer base. While applauding implementation of band segmentation by the FCC, Winstar takes issue with the paltry allocation of spectrum to FS providers and the absolute absence of new relocation allocations.

6. Teledesic inexplicably states that Winstar, "wastes many pages on its recent growth."¹² That totally misses the point that Winstar made a detailed and compelling case for the increasing *consumer-driven requirements* faced by various FS providers that require more FS spectrum. Since the filing of its Petition, Winstar reported a total of 110,000 customer lines added during the previous quarter, bringing cumulative installed lines to 920,000.¹³

7. Winstar's observations make it abundantly clear that the Order – when contrasted with the immediate needs of consumers and FS providers – allocates a trivial portion of the 18 GHz spectrum to FS providers. Meanwhile, those filing oppositions argue on behalf of customers that they do not yet have and for services that – in most cases – have yet to be provided. In light of the uncertain nature of the satellite industry, many of the proposed satellite service licensees

¹¹ See Hughes Petition at 2 – 3 (stating that Winstar "fails to acknowledge" the benefits of band segmentation); and See SIA Petition at 6; and See Teledesic Petition at 4 – 5 (implying that Winstar is somehow opposed to the overall concept of band segmentation).

¹² Teledesic Opposition at 3, fn 6.

¹³ See Winstar Press Release, *Winstar Reports Continued Strong Results*, dated November 8, 2000.

may ultimately never be realized. In stark contrast, the demand and growth within the FS market are well known, immediate and cannot be ignored.

8. Finally, in the 2 GHz Order, the private and common carrier fixed microwave services were “to be relocated to available frequencies in higher bands or to other media.”¹⁴ The situation in the 18 GHz proceeding, however, is just the opposite: the Commission has identified *no* new spectrum for relocation. Incumbents will merely be relocated *within* spectrum that is already saturated with current services and yet is expected to accommodate new ones.

9. Despite these facts, Hughes reaches the mind-boggling conclusion that “a comparison with the relocated services at 2 GHz and the terrestrial fixed service at 18 GHz actually argues for a *less* generous segmentation and relocation regime . . . than the regime installed at 2 GHz.”¹⁵ Hughes provides no logical nexus in reaching this conclusion, instead claiming – like various other Oppositions – that Winstar’s alleged failure to properly plan is the source of blame for the FCC’s relocation decision. Such statements are not only wholly incorrect but are ultimately irrelevant, even if they more accurately apply to the satellite industry. Rather – as a matter of fairness – FCC policy determinations should not be based upon attempting to assign culpability but upon FCC precedent and sound public policy rationale.

C. The FCC Must Recognize That Fiber and “Other Media” Are Often Not Available.

10. Several Oppositions imply or explicitly state that Winstar believes fiber and other alternative media are incapable of providing an adequate replacement for 18 GHz spectrum. That is not the Winstar position. Winstar is “technology agnostic” and liberally uses fiber and other

¹⁴ See First Report and Order and Further Notice of Proposed Rulemaking, *Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825, at para. 3 (Released April 30, 1996).

¹⁵ See Hughes Opposition at 3 (emphasis added).

media in its network. However, while other media will at times be a possible alternative to new FS spectrum, its *availability* as a viable solution in most cases is what is questionable. For example, only about 10,000 of the 750,000 commercial buildings in the U.S. have fiber optic installed. While fiber deployment between cities and under streets is robust, the annual growth in domestic fiber to buildings is slowing.¹⁶

II. The Basic Elements of the 18 GHz Order Should Be Based Upon Commission Precedent.

11. The specific recourse sought by Winstar –a voluntary negotiation period, adequacy of comparable facilities, the right to return to previous facilities and the allocation of adequate spectrum to FS providers – is soundly based upon FCC precedent. Thus, the FCC’s course of action regarding each of these issues should have been pre-determined. However, the Order disregards some FCC precedent.

A. FCC Precedent on Adequacy of Comparable Facilities Must Govern.

12. The importance of ensuring the adequacy of comparable facilities has been addressed previously in the Commission’s 800 MHz,¹⁷ and 2 GHz PCS Proceedings.¹⁸ In the 800 MHz proceeding, the FCC determined that if an incoming licensee does not provide an incumbent licensee with comparable facilities, the incumbent licensee will not be subject to mandatory relocation.¹⁹ Such provisions were deemed “necessary to protect the operational interests of

¹⁶ Piper Jaffray Equity Research – from 65% in 1996 to 9% in 1998.

¹⁷ See First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, 11 FCC Rcd 1463 (released December 15, 1995) (“800 MHz Order”).

¹⁸ See First Report and Order and Further Notice of Proposed Rulemaking, *Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825 (Released April 30, 1996) (“2 GHz Order”).

¹⁹ See 800 MHz Order at 74.

incumbent licensees.”²⁰ Further, the Commission found that such measures are “essential” in allowing incumbents to be better able “to engage in effective business planning.”²¹

13. Teledesic claims that because the Order is so clear, Winstar may be attempting “to bait the Commission into stating that the facilities must be perfect in every respect before relocation is required.”²² No. Winstar simply asks the FCC – point blank – to clarify that if no verifiably comparable facilities are offered, then the incumbent licensee is not required to move. The FCC has previously addressed the right of an incumbent licensee to return to its previous facilities in the event that comparable facilities are not available. That right must be reaffirmed.

B. A Voluntary Negotiation Period is Required.

14. Although the FCC has never before questioned the benefits of a voluntary negotiation period, this proven concept is wholly abandoned in the 18 GHz Order. The FCC should not discard a proven and fair system of relocation on the unproven premise that these proposed satellite systems will otherwise be deployed more rapidly on a nationwide basis than previous technologies that flourished in a voluntary negotiation environment. More importantly, the Commission should not choose – once again – to ignore its own precedent.

15. The 2 GHz proceeding established a voluntary negotiation period for incumbent licensees.²³ In doing so, the FCC claimed that the implementation of such a period would “facilitate negotiations.”²⁴ Despite the fact that most of the PCS licensees viewed the

²⁰ Id.

²¹ Id.

²² Teledesic Opposition at 9.

²³ See First Report and Order and Further Notice of Proposed Rulemaking, *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825 (Released April 30, 1996).

²⁴ Id. at 14.

implementation of a voluntary negotiation period as a hindrance to timely relocation at 2 GHz, the FCC remained convinced that it was an appropriate and equitable relocation requirement.²⁵

16. Voluntary negotiation periods have long proven effective in enabling incumbent licensees to negotiate fair and reasonable terms for relocation. Many of the Oppositions, with no evidentiary basis, view the prospect of a voluntary negotiation period as unfair. Further, some believe that such a period may be utilized for extracting premiums from incoming licensees.

17. The Commission found such concerns to be without merit in the 2 GHz proceeding. Reports of unfair behavior amounted to nothing more than apocryphal stories.²⁶ The fact is the 2 GHz transition proved successful. The ability of any two parties to negotiate on a voluntary basis without the direct involvement of the Commission can and should be viewed as having a positive effect on efficient and fair relocation. The voluntary period is essential for resolving many of the troubling details associated with any relocation in the best interests of all parties concerned. As such, the implementation of such a period should be strongly reconsidered by the Commission at 18 GHz.

III. Clarification: Assignments and Transfers of Control By Incumbent Licensees Must Not Result in a Loss of Primary Status

18. In its Petition, Winstar sought clarification that license assignments and transfers of control by incumbent licensees will not result in a loss of primary status within the 18 GHz band. Teledesic changes this request for clarification into an outright “proposal” being offered up by Winstar. Furthermore, Teledesic’s account of this clarification request manipulates and distorts its alleged implications in an unreasonably ominous manner. Teledesic claims that such an

²⁵ Id. at 11 (where the Commission raises the apparent specter of such a dilemma and subsequently fails to address it).

interpretation of the rules would somehow “*increase* terrestrial use of bands designated for satellite use,” and “aggravate the costs of relocation rather than mitigate them.”²⁷ Nothing could be further from the truth.

19. In stark contrast, Winstar addresses the issue of incumbent transferee rights based upon the same logic contained in its comments throughout this entire proceeding: FCC precedent. Most pertinent to the issue of transferee rights, the FCC should analyze the 18 GHz proceeding with respect to the 1850-1990 MHz and 2.1 GHz bands. These bands have also been subject to relocation procedures and FCC precedent – to the best of Winstar’s knowledge – has always been to grant primary status to incumbent license assignments and transfers of control. The adoption of Section 1.929 by the FCC did not change this practice. In fact, in adopting Section 1.929, the Commission emphasized that “[b]y creating a consolidated rule, it is not our intent to change the substance of our existing definitions of major and minor changes, or to impose new filing requirements on licensees and applicants.”²⁸ Moreover, at no point in the ULS proceeding was there any indication that a change to the Commission’s overall relocation policies was being contemplated.²⁹

20. Therefore, Winstar urges the FCC to clarify its rules regarding the assignment or transfer of control of 18 GHz grandfathered licenses. Such action by the FCC would not entail the conferral upon 18 GHz FS incumbents of any new rights or benefits.

²⁶ First Report and Order and Further Notice of Proposed Rulemaking, *Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825, 11 (Released April 30, 1996).

²⁷ Teledesic Opposition at 6 (emphasis in original).

²⁸ Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21027, at ¶ 61 (Oct. 21, 1998) (hereafter “ULS Proceeding”).

²⁹ As an illustration of the flawed logic contained in Teledesic’s Opposition, Winstar is currently considering assigning some of its 18 GHz links to Cellular One, one of Winstar’s customers. Under Teledesic’s argument,

IV. It Is Not In The Public Interest For The FCC To Bow To Threats From Forum Shoppers.

21. In the very first page of the Opposition of Teledesic, they note their federal court challenge against the FCC regarding the 18 GHz Order. Winstar does not believe it is in the public interest for parties – who rush to federal court when the FCC issues an Order – to threaten the FCC about their court actions while simultaneously making filings with the Commission that seek reconsideration actions.³⁰ That is forum shopping. Should the FCC bow to such tactics, it will only encourage similar behavior by all parties to any future action.

V. Conclusion

Winstar urges the Commission to reject the Oppositions to the Winstar Petition, which are summarized in the following chart.

PETITIONER/ COMPANY	STATEMENT OF OPPOSITION	RESPONSE
SIA p. 6-8 Hughes, pg. 5 Teledesic, pg. 11 Astrolink, pg. 3	ISSUE OF OTHER MEDIA. Several Oppositions imply and explicitly state that Winstar believes fiber and other alternative media will never provide an adequate replacement for 18 GHz spectrum.	Wrong. Winstar is technology agnostic and uses fiber and other technologies in its network (See Winstar Petition 12 – 14). Winstar asked the FCC to acknowledge the obvious -- that comparable technologies, such as fiber are often not available to serve the exact customers currently receiving 18 GHz service. Therefore, until a comparable replacement actually exists for a customer, spectrum must remain available.
SIA, pg. 6 Hughes, pg. 6 Teledesic, pg. 11	ISSUE OF ADMINISTRATIVE SUFFICIENCY. Several Oppositions question the procedural and administrative sufficiency of the Winstar Petition. The Parties claim that Winstar fails in its Petition to state with particularity the respects in which the 18 GHz Order should be changed.	Wrong. This is a classic “red herring.” Winstar is an 18GHz licensee that stated with particularity numerous recommended changes to the Order (See Winstar Petition p. 1-20). If Winstar did not recommend any particular changes to the Order, then why are these Organizations filing detailed rebuttals asking the FCC to not adopt the Winstar proposals.

Cellular One would only get licenses with secondary status. This simply does not make any sense. The status of the link should not materially change as the result of a simple assignment of authority or transfer of control.

³⁰ In addition to its Opposition, on September 9, 2000, Teledesic filed a document with the FCC seeking certain corrections and clarifications of the Order. See Public Notice, Report No. 2447, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings* (Oct. 20, 2000).

PETITIONER/ COMPANY	STATEMENT OF OPPOSITION	RESPONSE
SIA p. 6 TRW, pg. 3	FAILURE TO ADDRESS THE EXPLOSIVE GROWTH OF THE FS INDUSTRY. Several Oppositions attack Winstar's complaint regarding the Order's failure to account for the explosive growth within the FS industry. Several of these Oppositions misconstrue Winstar as opposing Band Segmentation.	Wrong. Winstar's observations make it abundantly clear that the Commission's Order – when contrasted with the immediate needs of FS providers – allocates a trivial portion of the 18 GHz spectrum to FS providers. As a result, FS providers will continue to face a shortage of spectrum for their continuously expanding customer base, and consumers who could otherwise be swiftly served will be frustrated.
SIA p. 8 Hughes, pg. 4 Pegasus, pg. Teledesic, pg. 8 Astrolink, pg. 3	ISSUE OF COMPARABLE FACILITIES. Several Oppositions attack Winstar's request for clarification regarding the requirement that comparable facilities be provided to incumbent licensees, prior to requiring the incumbent to move. Some argue that satellite licensees can be ordered to take additional measures to ensure compatibility <u>after</u> the FS licensee has relocated.	Impractical. No company should be forced to endanger customer service and switch over to a system not established to be comparable. The adequacy of comparable facilities has been addressed previously in the Commission's 800 MHz and 2 GHz PCS Proceedings. The Commission has viewed prior verification actions as necessary for the protection of the operational interests of incumbent licensees and their customers.
SIA p. 9 Hughes, pg. 6 Teledesic, pg. 8 Astrolink, pg. 5	FAILURE TO ESTABLISH A VOLUNTARY NEGOTIATION PERIOD. Several Oppositions claim that voluntary negotiation periods allow existing Licensees to refuse to negotiate.	No. History proves that voluntary negotiations are an integral part of a successful relocation. For example, PCS systems are deployed throughout the 2 GHz band. The FCC should not discard a proven and fair system of relocation on the unproven premise that satellite systems will be deployed more rapidly. More importantly, the Commission must not ignore its own precedent.
SIA p. 9 Hughes, pg. 6 Teledesic, pg. 8 Astrolink, pg. 6	RIGHT OF INCUMBENTS TO RETURN TO PREVIOUS FACILITIES. Several Oppositions reject the establishment of the right of an incumbent to return to previous facilities.	Misguided. The 18 GHz Order must reaffirm the equitable principle of the right of incumbent licensees to return to previous facilities, in the event facilities do not prove to be comparable. Despite the fact that such a provision would keep with FCC precedent, almost all of the satellite Oppositions wish to avoid its implementation.

Ultimately, the Commission should follow its own precedence by clarifying and reconsidering its Order as outlined in the Winstar Petition.

Respectfully Submitted,
By: /s/ Jack Richards
Jack Richards
Keller and Heckman, LLP
1001 G Street, NW
Washington, D.C. 20001

November 23, 2000

CERTIFICATE OF SERVICE

I, Kevin G. Rupy, do hereby certify that on this 24th day of November, 2000, I have caused a copy of the foregoing "Reply of Winstar Communications, Inc." in IB Docket No. 98-172 to be served by First Class Mail upon the persons listed below.

/s/ Kevin G. Rupy
Kevin G. Rupy

Ms. Magalie Roman Salas
Federal Communications Commission
445 - 12th Street, S.W.
Twelfth Street, Lobby, TW-A325
Washington, D.C. 20554

Honorable William E. Kennard
Chairman
Federal Communications Commission
445-12th Street, S. W.
Washington, DC 20554

Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445-12th Street, S.W.
Washington, DC 20554

Honorable Susan Ness
Commissioner
Federal Communications Commission
445-12th Street, S. W.
Washington, DC 20554

Honorable Michael Powell
Commissioner
Federal Communications Commission
445-12th Street, S. W.
Washington, DC 20554

Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445-12th Street, S. W.
Washington, DC 20554

Mark A. Grannis
Samuel L. Feder
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, NW
Washington, DC 20036

William J. Burhop
Executive Director
Independent Cable & Telecommunications
Association
3004 Oregon Knolls Drive, NW
Washington, DC 20015

Norman P. Leventhal
Stephen D. Baruch
David S. Keir
Leventhal, Senter & Lerman, P.L.L.C.
2000 K Street, NW, Suite 600
Washington, DC 20006

Michael T.N. Fitch
Clayton Mowry
The Satellite Industry Association
225 Reinekers Lane, Suite 600
Alexandria, VA 22314

Raymond G. Bender, Jr.
Carlos M. Nalda
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036

Peter A. Rohrbach
Karis A. Hastings
Hogan & Hartson L.L.P.
555 Thirteenth Street, NW
Washington, DC 20004

Gary M. Epstein
John P. Janka
Arthur S. Landerholm
Latham & Watkins
1001 Pennsylvania Ave., NW
Suite 1300
Washington, DC 20004

Mark R. O'Leary
GE American Communications, Inc.
Four Research Way
Princeton, NJ 08540

Bruce D. Jacobs
Tony Lin
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128